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HEARING BEFORE THE
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES
ON
"REDUCING THE REGULATORY BURDEN ON SMALL BUSINESS: IMPROVING THE REGULATORY FLEXIBILITY ACT."

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Madam Chair and Members of the Committee:

I am pleased to be here today to discuss the Regulatory Flexibility Act with you. This Act is a recognition of the importance of our small business community and of the fact that federal regulation may have a disproportionate impact on small businesses and small communities. I attended the SBA Office of Advocacy's Symposium on the 25th Anniversary Symposium Act two years ago and came away with the impression that the Act is generally working well under the stewardship of that Office. But I welcome this Committee's review of the need for improvements.

Background[1]

The Regulatory Flexibility Act (RFA)[2] adopts the "impact-statement" approach originated in the 1970 National Environmental Policy Act by directing agencies to consider the potential impact of regulations on small business and other small entities. Originally enacted in 1980, it mandates consideration of regulatory alternatives that accomplish the stated objectives of the proposed rule and that minimize any significant economic impact on such entities. In follow-up legislation, in 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA),[3] which

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[1] This section (pages 1-6) is adapted from JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (4th ed.) 151-58, 255-58 (American Bar Ass'n 2006).

[2] Pub. L. No. 96-354, 94 Stat. 864 (1980) (codified as amended at 5 U.S.C. §§ 601-612).

[3] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C.). *See generally* Thomas O. Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L.

strengthened the RFA, required agencies to produce new regulatory compliance guides and guidance materials,[4] and added additional consultation requirements for "covered agencies" (currently only EPA and OSHA).[5]

Coverage

The Regulatory Flexibility Act incorporates the Administrative Procedure Act's (APA's) broad definition of "agency,"[6] making it applicable to independent regulatory agencies as well as executive agencies. Despite the significant strengthening amendments in SBREFA, the RFA's coverage still has a few important limitations. First, it applies only to rules for which an agency publishes a notice of proposed rulemaking, either pursuant to the APA or some other law, and it does not apply to ratemaking.[7] The RFA's flexibility analysis requirements also are limited to rulemaking for which the agency "is *required* by section 553 . . . or any other law, to publish general notice of proposed rulemaking for any proposed rule or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States . . . ."[8] Thus, technically, the flexibility analysis requirements do not apply where the agency voluntarily follows notice-and-comment procedure, although they may well be found to

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REV. 123 (1997). A key change was the addition of judicial review of compliance with the RFA. SBREFA § 242, 110 Stat. at 865.

[4] 110 Stat. at 858 (codified at 5 U.S.C. § 601 note). The compliance guides are to be issued with each rule having a significant economic impact on a substantial number of small entities and are to assist small entities in complying with the rule. For a critical review of agency activities under this requirement, see U.S. GEN. ACCOUNTING OFFICE, REGULATORY REFORM: COMPLIANCE GUIDE REQUIREMENT HAS HAD LITTLE EFFECT ON AGENCY PRACTICES (GAO-02-172) (Dec. 2001). For an example of an agency that takes this mandate seriously, see the Department of Labor's website, http://www.dol.gov/compliance.

[5] SBREFA also created a Small Business and Agriculture Regulatory Enforcement Ombudsman and the congressional review process. 15 U.S.C. § 657; 5 U.S.C. §§ 801-08.

[6] 5 U.S.C. § 601(1).

[7] *Id.* § 601(2). *Compare* Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005) (requiring Corps to conduct regulatory flexibility analyses before issuing nationwide dredge-and-fill permits because that action was rulemaking and binding nature of rule made it a legislative rule that should have required notice of proposed rulemaking) *with* Am. Moving & Storage Ass'n, Inc. v. U.S. Dep't. of Defense, 91 F. Supp. 2d 132 (D.D.C. 2000) (holding that a DOD change in procurement policies was not a "rule" under RFA, notwithstanding a DOD statute requiring an opportunity for comment on such changes; alternatively, the nature of the change amounted to "ratemaking" and was therefore was not within RFA definition of rule for that reason).

This provision in the RFA also makes the Act inapplicable to final (and interim-final) rules issued pursuant to an exemption from notice and comment. *See also* Nat'l Ass'n for Home Care v. Shalala, 135 F. Supp. 2d 161, 165-66 (D.D.C. 2001) (Act does not apply to interpretive rules; finding HHS's rule to be interpretive because HHS was interpreting the Balanced Budget Act of 1997, which was itself written with "remarkable specificity"). *Compare* U.S. Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005) (finding that Act applies because the challenged action was a legislative rule) *with* Cent. Texas Tel. Co-op., Inc. v. FCC, 402 F.3d 205, 213 (D.C. Cir. 2005) (finding the Act did not apply because the challenged action was an interpretive rule).

[8] *Id.* § 603(a) (emphasis added). The language pertaining to IRS interpretive rules was added by SBREFA. *Id.* § 604(a).

apply to rulemaking where the agency has, by regulation, subjected itself to notice-and-comment procedure.[9]

Through requirements for notice and analysis, the RFA requires agencies to consider the impact of proposed rules on "small entities"—including "small businesses," "small (not-for-profit) organizations," and "small governmental jurisdictions."[10] The Act does not, however, mandate any particular outcome in rulemaking. It only requires consideration of alternatives that are less burdensome to small entities and an agency explanation of why alternatives were rejected.[11] Four regulatory alternatives are included in the Act as examples of alternatives to be considered in rulemaking: "tiering," classification and simplification, performance rather than design standards, and exemptions.[12]

Role of the Chief Counsel for Advocacy

The RFA charges the Chief Counsel for Advocacy of the Small Business Administration ("Chief Counsel for Advocacy") with overseeing agency compliance with the flexibility analysis requirements.[13] In 2002, President Bush signed Executive Order 13,272, entitled "Proper Consideration of Small Entities in Agency Rulemaking."[14] For the most part the

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[9] This interpretation is suggested in Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 240.

[10] The Act contains definitions of these terms, but they are open-ended in the sense that agencies can establish alternative definitions appropriate to their activities. 5 U.S.C. § 601(3)-(5). The Department of Commerce also provides the following definitions:

> A small business is any business that meets the size standards set forth in part 121 of Title 13, Code of Federal Regulations (CFR). Part 121 sets forth, by the North American Industry Classification System (NACIS), the maximum number of employees or maximum average annual receipts a business may have to be considered a small entity. Provision is made for an agency to develop industry-specific definitions. The NACIS is available at http://www.sba.gov/size/sizetable2002.html. A small organization is any not-for-profit enterprise that is independently owned and operated and not dominant in its field. A small government jurisdiction is any government or district with a population of less than 50,000.

GUIDELINES FOR PROPER CONSIDERATION OF SMALL ENTITIES IN AGENCY RULEMAKING, *available at* http://www.ogc.doc.gov/ogc/legreg/zregs/guidelines.htm.

[11] 5 U.S.C. § 603(a)(3). The declaration of purpose in the note accompanying 5 U.S.C. § 601 states in part:

> It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

It should be pointed out that the agency's explanation, as set forth in any regulatory flexibility analysis, will be part of the "whole record of agency action" if judicial review of a final rule is sought. *Id.* § 611(b).

[12] 5 U.S.C. § 603(c).

[13] *Id.* § 612(a).

[14] Issued August 13, 2002, 67 Fed. Reg. 53,461 (Aug. 16, 2002).

Order simply restates the requirements of the RFA, but the Order gives greater prominence to the role of the Chief Counsel for Advocacy and specifically requires an agency to provide the Chief Counsel with a draft of any proposed rule that may require a flexibility analysis at the same time the agency provides it to the Office of Information and Regulatory Affairs (OIRA) under E.O. 12,866[15] or, if the draft is not required to be sent to OIRA, at a reasonable time prior to publication of the proposed rule.

The Chief Counsel not only advises agencies as to his views on proposed rules, he also reports at least annually on agency compliance to the President and Congress,[16] and unlike any other federal official, he also has the statutory authority to participate in litigation as an amicus curiae is support of challenges to agency rules.[17] For example, in one case, the Chief Counsel submitted an amicus brief supporting a small business's claim that the RFA exception under Section 605—waiving the flexibility analysis requirement when the head of the agency believes the rule would not have a "significant economic impact on a substantial number of small entities"—should not apply. The court agreed with the Chief Counsel that in defining "small entity," agencies should use the SBA's definition. In this case the rulemaking agency did not, and therefore did not comply with the RFA.[18]

The Regulatory Flexibility Act operates within the APA rulemaking process in the following fashion: Unless the agency head certifies to the Chief Counsel for Advocacy and publishes such certification in the Federal Register that the rule will not have a "significant economic impact on a substantial number of small entities,"[19] an agency must prepare an "initial regulatory flexibility analysis" (IRFA). The IRFA, or a summary thereof, must be published in the Federal Register along with the proposed rule. Courts now regularly review such certifications.

Judicial Review

Courts are instructed to conduct their review in accordance with Chapter 7 of the APA. Accordingly, several courts have held that the standard of review is one of reasonableness, meaning that the agency must have made a reasonable, good-faith effort to carry out the requirements of the statute. *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997); *see also Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411 (M.D. Fl. 1998). Under the reasonableness standard, an agency need only consider significant alternatives to a rule, rather than all alternatives, when doing a final regulatory flexibility analysis (FRFA). *Associated Fisheries*, 127 F.3d at

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[15] Exec. Order 12,866 § 3(f), 58 Fed. Reg. 51,735 (1993).

[16] *Id. See also*, *e.g.*, SBA OFFICE OF ADVOCACY, REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2004 (Feb. 2005), *available at* http://www.sba.gov/advo/laws/flex/04regflx.html. *See also* Cindy Skrzycki, *Small Business Advocate Plays a Big Role in Rulemaking*, WASH. POST, Jan 11, 2005 at E-1 (describing the increasing clout of this office).

[17] 5 U.S.C. § 612 (b).

[18] Nw. Mining Ass'n v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998).

[19] 5 U.S.C. § 605(b).

116. Similarly, an agency must make a reasonable effort to facilitate participation by small entities, but the method and manner of accomplishing this was left to agency discretion, since the Act only offered suggestions. *Id.* at 117. *Southern Offshore* applied the reasonableness standard and concluded that the agency's certification of no "significant economic impact on a substantial number of small entities" was unsatisfactory because the evidence contradicted many of the assumptions upon which the certification was based. *Southern Offshore*, 995 F.Supp. at 1436.

Several cases have involved challenges to the adequacy of an agency certification of no "significant economic impact on a substantial number of small entities" in a FRFA by claiming that the agency failed to consider the effects of the proposed rule on a particular entity. The first case, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985), determined that the certification was valid because the agency need only consider the rule's direct impact on regulated entities and not the indirect impacts of the rule on entities not regulated by the agency. More recent cases have affirmed *Mid-Tex's* holding.[20]

The Certification Process

The IRFA or the certification must be sent to the Chief Counsel for Advocacy. When a rule proposed rule may have a "significant economic impact on a substantial number of small entities," the agency, in addition to publishing the proposed rule and IRFA, or summary, in the Federal Register, "shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques" such as advance notice of proposed rulemaking, publication of notice in specialized publications, direct notification of small entities, the holding of public conferences or hearings, or use of simplified or modified procedures that make it easier for small entities to participate.[21] After the comment period on the proposed rule is closed, the agency must either certify a lack of impact or prepare a FRFA, which, among other things, responds to issues raised by public comments on the IRFA.[22] The agency is not required to send the FRFA to the Chief Counsel for Advocacy, but it must make it available to the public on request and publish the analysis or a summary of it in the Federal Register.[23]

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[20] *See*, *e.g.*, Cement Kiln Recycling Coalition v. E.P.A., 255 F.3d 855 (D.C. Cir. 2001); Motor & Equipment Manufacturers Ass'n v. Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998); United Distribution Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996); State of Colo. *ex rel.* Colorado State Banking Bd. v. Resolution Trust, 926 F.2d 931 (10th Cir. 1991), White Eagle Co-op Ass'n. v. Johanns, 508 F. Supp. 2d 664, 676 (N.D. Ind. 2007). *But see* Federal Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161 (D.C. Cir. 2007) (distinguishing *Mid-Tex*), and American Federation of Labor v. Chertoff, --- F.Supp.2d ---, 2007 WL 2972952 (N.D. Cal. 2007) (enjoining a Department of Homeland Security rule in part because the rule was promulgated in violation of the Regulatory Flexibility Act).

[21] 5 U.S.C. § 609.

[22] *Id.* § 604(a). *See also* Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 470-71 (D.C. Cir. 1998) (accepting FAA's responses to comments on IRFA).

[23] *Id.* § 604(b).

Periodic Review and Agendas

The Regulatory Flexibility Act also requires agencies to publish and implement a plan for reviewing (within ten years) existing (and subsequently issued) rules that have a significant economic impact on a substantial number of small entities.[24] The agency is to review existing rules to minimize any "significant economic impact on a substantial number of small entities."[25] This review should consider the continued need for the rule; the nature of complaints or comments received concerning the rule; the complexity of the rule; the extent of duplication or conflict with other federal, state, or local regulation; and any relevant economic or technological changes that have occurred since the rule was issued.[26] There has been some strong criticism of the way this part of the Act has been implemented.[27]

Finally, the Act requires each agency to prepare a regulatory flexibility agenda of rules under development that may have a "significant economic impact on a substantial number of small entities."[28] The agenda must be published in the Federal Register semiannually, in October and April, and is to be transmitted to the Office of Advocacy for comment and brought to the attention of small entities or their representatives.[29] In practice, this agenda is incorporated into the Unified Agenda of Federal Regulatory and Deregulatory Actions, published semiannually by the Regulatory Information Service Center in the General Services Administration.[30] The SBA Office of Advocacy has also issued a lengthy guide for agencies on compliance with the RFA.[31]

Issues raised by the Reg-Flex Act.

1. The RFA's triggering language

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[24] *Id.* § 610(a). The period for review may be extended in one-year increments for up to five additional years. *Id.*

[25] 5 U.S.C. § 610(b). Throughout the Act, the goal of minimizing the impact on small entities is always understood to be considered in the context of achieving objectives of the relevant statute underlying the regulation in question. 5 U.S.C. §§ 603(c), 604(a)(3), 606.

[26] *Id.* § 610(b).

[27] *See* Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—and Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199 (May 2006).

[28] *Id.* § 602(a).

[29] *Id.* § 602(b)-(c).

[30] *See*, *e.g.*, REGULATORY INFORMATION SERVICE CENTER, UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS, *Index to Entries That Agencies Have Designated for Section 610 Review* (Spring 2004), *available at* http://ciir.cs.umass.edu/ua/Spring2004/indexes/Section_610_Review_Index.html.

[31] *See* SBA OFFICE OF ADVOCACY, "A GUIDE FOR GOVERNMENT AGENCIES—HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT" (May 2003) *available at* http://www.sba.gov/advo/laws/rfaguide.pdf; *see also* DEPARTMENT OF COMMERCE, GUIDELINES FOR PROPER CONSIDERATION OF SMALL ENTITIES IN AGENCY RULEMAKING, *supra* note 10.

The RFA's central provision requires an agency issuing any notice of proposed rulemaking required by Section 553 of the APA to prepare and make available for public comment an initial regulatory flexibility analysis. But the RFA provides that this requirement "shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

The meaning of the unwieldy phrase "significant economic impact on a substantial number of small entities" (which has been given the unfortunate acronym of SEISNOSE) thus becomes the pivotal threshold issue for agencies when they determine whether or not to undertake the drafting of an initial regulatory flexibility analysis. This will also determine of course whether the agency must subsequently do a final regulatory flexibility analysis, but it also determines whether various other requirements of the Act are triggered. This has been called a "domino effect" by the Government Accountability Office (GAO), which has also concluded that the lack of clarity in the phrase "significant economic impact on a substantial number of small entities" is hampering the success of the entire RFA:

> [T]he full promise of RFA may never be realized until Congress clarifies key terms and definitions in the Act, such as "a substantial number of small entities," or provides an agency or office with the clear authority and responsibility to do so. It is also important to keep in mind the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations.[32]

The phrase encompasses a number of elements, each of which is in need of definition or at least elaboration: (1) "significant economic impact," (2) "substantial number," and "small entities." Executive Order 13,272 has directed federal agencies, after consulting with the Chief Counsel for Advocacy, to "issue written procedures and policies, consistent with the Act, to ensure [compliance with the Act],"[33] and the Chief Counsel has produced a useful compliance guide for federal agencies that describes the legislative history and court decisions on the meaning of "significant economic impact on a substantial number of small entities," yet there is still seems to be uncertainty as to this key issue.

The GAO has suggested that a reason for this was that the Chief Counsel for Advocacy was not delegated the responsibility to make such interpretations.[34] I would defer to the Chief Counsel's view as to whether additional authority to do so would be necessary, but I note that in the analogous area of environmental impact statements, the President

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[32] GOVERNMENT ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS 1, GAO-06-998T (July 20, 2006).

[33] *See* note 14 *supra*, at § 3.

[34] GAO Report, *supra* note 32.

authorized the Council on Environmental Quality to issue binding regulations concerning the implementation of NEPA by federal agencies.[35] This Committee may wish to compare the CEQ's authority with that of the Chief Counsel for Advocacy. In connection with this issue, an attorney in the Office of Advocacy has written that, while the Executive Order is working well in general, "many independent agencies assert they are not subject to the executive order and make no effort to comply with it."[36] He recommends that Congress codify the Order to remove such doubts, and that is certainly worth considering.

Another "triggering" issue concerns the important limitation that the Act does not apply to the vast amount of administrative activity that is not rulemaking, such as adjudication, consent decrees and other types of informal actions. Except for the limited set of IRS interpretive rules, the Act also does not reach rulemaking that is not subject to notice and comment, such as interpretive rules, policy statements, and other rules exempt from notice and comment by virtue of the subject-matter exemptions in section 553 of the APA.

I think it would be difficult to draft a provision that would apply the Act to the wide variety of non-binding guidance that agencies issue to the public (though I would be interested to know how it is working with respect to IRS interpretive rules). Furthermore, a new OMB bulletin has attempted to rein in agency use of "binding guidance" (which should be an oxymoron).[37] So I don't advocate expanding the Act's coverage in this regard at this time. I would, however, recommend that Congress amend the APA to eliminate the exemption from notice and comment for rules relating to "public property, loans, grants, benefits, or contracts."[38] It has been long-recognized that this exemption is outdated[39] and removing it would also extend the coverage of the RFA to such rules.

Finally, there seems to be much less oversight, guidance, and case law concerning the Act's coverage of small communities and small organizations. The Office of Advocacy (being part of the Small Business Administration), naturally would give more attention to

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[35] *See* Executive Order 11,991 Relating to Protection and Enhancement of Environmental Quality (May 24, 1977), *available at* http://www.hud.gov/offices/cpd/environment/lawsandregs/laws/lawsauthorities/eo/11991.cfm.

[36] Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goals?*, 33 FORDHAM URB. L.J 1119, 1136-37 (2006).

[37] *See* Office of Management and Budget, "Bulletin on Good Guidance Practices," Issued January 18, 2007, 72 Fed. Reg. 3432 (Jan. 25, 2007). This was followed up by a Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, (M-07-13), from Rob Portman, Director, OMB, "Implementation of Executive Order 13422 (amending Executive Order 12866) and the OMB Bulletin on Good Guidance Practices" April 25, 2007, *available at* http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf.

[38] 5 U.S.C. § 553(a)(2).

[39] *See, e.g.*, ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 38 Fed. Reg. 19,782 (July 23, 1973) (recommending elimination of this exemption), *available at* http://www.law.fsu.edu/library/admin/acus/305698.html.

the small business aspects of the Act. The Congress might well consider whether the other two intended beneficiaries of the Act have been given inadequate attention.

2. The role of judicial review.

When Congress was considering the addition of judicial review to add teeth to the RFA in the early 1990's I was somewhat concerned that separate intensive court review of RFA compliance, apart from review of the rule itself, might lead to increased "ossification" of the rulemaking process.[40] I am happy to say that my fears have not been borne out. While the courts have by and large used a reasonableness test to review agency compliance with the statute, they have been willing to invalidate agency certifications in enough cases that agencies have to take their RFA responsibilities seriously. A case in point is the recent decision that received wide publicity, *American Federation of Labor v. Chertoff*,[41] which enjoined a Department of Homeland Security rule that would have added receipt of a no-match letter to a list of examples "that may lead to a finding that an employer had ... constructive knowledge" of an employee's unauthorized [immigration] status," in part because the agency improperly certified that the rule would not have a "significant economic impact on a substantial number of small entities."

One trend in the caselaw that might, however, require legislative attention is the tendency to find that agencies need only consider the rule's direct impact on regulated small entities and not the indirect impacts of the rule on entities not regulated by the agency.[42] While it would be burdensome for agencies to have to consider every ripple effect of a rule, I would think it would be reasonable for agencies to consider substantial indirect effects on small entities as well.

3. The role of the Chief Counsel for Advocacy of the Small Business Administration in superintending the Act.

Even a cursory look at the website of the Office of the Chief Counsel for Advocacy,[43] and its most recent Annual Report,[44] shows the breadth and depth of the Office's efforts to

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[40] *See* Testimony of Jeffrey S. Lubbers, Research Director, Administrative Conference of the United States, before the Subcomm. on Administrative Law and Government Relations, Comm. of the Judiciary, House of Representatives, on H.R. 830, Regulatory Flexibility Amendments Act of 1993 (Nov. 18, 1993).

[41] --- F.Supp.2d ----, 2007 WL 2972952 (N.D. Cal. 2007).

[42] *See* Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985). See also Cement Kiln Recycling Coalition v. E.P.A., 255 F.3d 855 (D.C. Cir. 2001); Motor & Equipment Manufacturers Ass'n v. Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998); United Distribution Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996); State of Colo. *ex rel.* Colorado State Banking Bd. v. Resolution Trust, 926 F.2d 931 (10th Cir. 1991), White Eagle Co-op Ass'n. v. Johanns, 508 F. Supp. 2d 664, 676 (N.D. Ind. 2007). *But see* Federal Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161 (D.C. Cir. 2007) (distinguishing *Mid-Tex*),

[43] Http://www.sba.gov/advo/index.html.

[44] OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, FY 2006 ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272 (Feb. 2007), *available at* http://www.sba.gov/advo/laws/flex/06regflx.html.

implement the RFA. My impression is that the Office is working well. The main issues are whether the Office should be given more authority as described above, and perhaps whether the Office should be established as an independent agency, with its own budget, more along the lines of the Office of Special Counsel.[45]

4. The ten-year reviews required by Section 610 of the Act.

Two recent commentaries, one a law review article by a former Assistant Chief Counsel for Advocacy (now an attorney with the American Petroleum Institute),[46] and an extensive GAO new report,[47] have suggested that the ten-year review process is not working well.

The article concluded:

> Unfortunately, over the past twenty-five years, federal regulators have often ignored section 610 and have not conducted periodic reviews of their rules. Even those agencies which review some of their existing rules under section 610 rarely act in response to their reviews. Most of these agencies comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the Federal Register. Ironically, when regulators conduct periodic reviews under section 610, they are far more likely to increase the burden of regulation on small entities than to reduce it.[48]

The article ascribed this to three reasons: "agencies (1) 'restarting the clock' by amending regulations, (2) determining that rules are not actually affecting small entities, and (3) in some cases, simply neglecting to fulfill their statutory duties."[49]

The problem also involves incentives related to the definitional "domino effect" mentioned above:

> The problem stems from the lack of definitions in the RFA for the terms "significant economic impact" and "substantial number." Some agencies routinely certify rules [as having no such impact] by adopting standards for these terms which result in every rule being certified. The rationale behind such action is twofold. First, the agency avoids being required to conduct regulatory flexibility analyses which consume agency resources

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[45] The Office of Special Counsel is an independent agency in the Executive Branch charged with protecting federal whistleblowers and enforcing the Hatch Act. The Special Counsel has a five year term and is only removable for cause. *See* http://www.osc.gov/intro.htm.

[46] Michael R. See, *supra* note 27.

[47] GOVERNMENT ACCOUNTABILITY OFFICE, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS, GAO-07-791 (July 2007).

[48] See, *supra* note 27, at 1200.

[49] *Id.* at 1219.

> and could support a regulatory alternative other than that which the agency favors. Second, agencies avoid any requirement to ever review their rules, and can conserve agency resources later on.[50]

The article suggests a number of legislative fixes for this problem, including sunsetting unreviewed rules, automatic rulemaking proceedings after ten years, and so on. My own view is that such cures might be worse than the disease. I would prefer to see the mandatory ten-year review requirement be scrapped in favor of a more targeted approach.

Mandates for agencies to consider the impact of existing rules (sometimes called "lookback") have been issued by every president since President Carter,[51] and agencies have been engaging in numerous discretionary reviews ever since. My conclusion that mandatory reviews are counter-productive is bolstered by the new GAO report, which identified a number of challenges that agencies generally face in undertaking reviews.

These include difficulties in collecting the data needed to demonstrate results, the diverse and complex factors that affect agencies' results (for example, the need to achieve results through the actions of third parties), the long time period required to see results in some areas of federal regulation, and the fact that it is often more difficult to estimate the benefits of regulations than it is to estimate the costs.[52] It is also hard to fit often-amended rules into a particular time frame for review.

The GAO report looked at all manner of retrospective review of rules engaged in by federal agencies. The report concluded:

> One of the most striking findings during our review was the disparity in the perceived usefulness of mandatory versus discretionary regulatory reviews. The agencies characterized the results of their discretionary reviews as more productive and more likely to generate further action. A primary reason for this appears to be that discretionary reviews that address changes in technology, advances in science, informal agency feedback, harmonization efforts, and petitions, among other things, may be more closely attuned to addressing issues as they emerge.[53]

This leads me to believe that a better approach is the technique used in the current Administration of seeking nominations from the regulated public on rules which should be reformed. This practice, which was begun by OMB in 1997,[54] led, for example, to a

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[50] *Id.* at 1223-24 (footnote omitted).

[51] *See* GAO Report, *supra* note 47, at 10.

[52] *See* GAO Report, *supra* note 47, at 11-12.

[53] *Id.* at 51. *See also* ACUS Recommendation 95-3, "Review of Existing Agency Regulations," 60 Fed. Reg. 43,108 (Aug. 18, 1995), *available at* http://www.law.fsu.edu/library/admin/acus/305953.html (noting the difficulty of such reviews and urging Congress to avoid standardization and additional judicial review of such reviews).

[54] *See* See, *supra* note 27 at 1210, citing Office of Mgmt. and Budget, Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 63 Fed. Reg. 44,034 (Aug. 17,

response to a 2001 notice in which OMB received seventy-one nominations, and designated twenty-three of them as "high priority."[55] The next year, OMB received recommendations for the reform of 316 separate rules and guidance documents. Of these, OMB, the Chief Counsel for Advocacy, and the federal agencies mentioned identified thirty-four existing rules to be in need of reform.[56]

Thus, I think that rather than try to force agencies to review all rules in a set period, it would be better if the agencies were instructed to seek the public's input periodically as to which rules should be reviewed, and to issue a report responding to such suggestions—giving special attention to those which may disproportionately affect small entities.

5. The Small Business Advocacy Review Panel Requirements in Section 609 of the Act.

In the 1996 SBREFA amendments to the RFA, Congress added a new provision requiring a "covered agency," prior to issuance of the initial regulatory flexibility analysis, to convene a special review panel consisting of agency, Office of Management and Budget and Small Business Administration officials, and representatives of affected small entities.[57] The panel must file a public report on the impacts of the proposal within 60 days. Only two agencies (EPA and OSHA) are included in the definition of "covered agency" for the purposes of this provision.

According to the Chief Counsel's website, since 1996 there have been 31 EPA panels[58] and eight OSHA panels,[59] which seems like a rather low number. But a GAO report finding provides some clues to why:

> [A]fter SBREFA took effect EPA's four major program offices certified that almost all (96 percent) of their proposed rules would not have a significant impact on a substantial number of small entities. EPA officials told us this was because of a change in EPA's RFA guidance prompted by the SBREFA requirement to convene an advocacy review panel for any proposed rule that was not certified. Prior to SBREFA, EPA's policy was to prepare a regulatory flexibility analysis for any rule that the agency

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1998); and Office of Mgmt. and Budget, Notice and Request for Comments, Draft Report to Congress on the Costs and Benefits of Federal Regulations, 62 Fed. Reg. 39,352 (July 22, 1997).

[55] *See id.*, citing Office of Mgmt. and Budget, Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 104-06 (2002), *available at* http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (status of the twenty-three High-Priority Rules OIRA Suggested for Reform in 2001).

[56] *See id*., citing OMB, Stimulating Smarter Regulation at 4, 25-28.

[57] 5 U.S.C. § 609(b)(5). For an early assessment of the implementation of this requirement, see U.S. GEN. ACCOUNTING OFFICE, REGULATORY REFORM: IMPLEMENTATION OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL REQUIREMENTS (GAO-GGD-98-36) (MAR. 1998).

[58] *See* http://www.sba.gov/advo/laws/is_epapanels.html.

[59] *See* http://www.sba.gov/advo/laws/is_oshapanels.html.

> expected to have any impact on small entities. According to EPA officials, the SBREFA panel requirement made continuation of the agency's more inclusive RFA policy too costly and impractical.

I cannot say whether the RFA review panels have produces sufficient added value to the usual EPA and OSHA rulemaking process, or whether additional agencies should be "covered." This would perhaps be a good study for a revived Administrative Conference.[60]

6. The Act's analytical requirements in context with other analytical requirements applicable to rulemaking.

The RFA is one of many statutes and Executive Orders that require agencies to undertake separate analyses in rulemaking. For "significant regulatory actions" subject to Executive Order 12,866; rules containing information-collection requirements; rules likely to have significant economic impact on state, local, and tribal governments; and rules implicating certain other policy interests, an agency must undertake a special analysis. Where such analyses are required, an initial or preliminary report must generally be prepared in conjunction with the notice of proposed rulemaking, and a final report, responding to comments on the earlier report, must be prepared with the final rule.

Executive Order 12,866 requires a cost-benefit assessment of "economically significant rules" that evaluates the potential costs and benefits of the proposed rule. It also requires a description of alternative approaches that could substantially achieve the same regulatory goal at a lower cost and a brief explanation of the legal reasons why such alternatives could not be adopted.[61] The Paperwork Reduction Act[62] requires an agency to justify the burdens imposed by information collection requirements. The Unfunded Mandates Reform Act[63] essentially codified E.O. 12,866's analysis requirements and extended them to rules having a special impact on state, local, or tribal governments, as well as on the private sector. In addition, executive orders on federalism, tribal governments, takings of private property, energy effects, and the protection of children from environmental health risks require analysis of a rulemaking's impacts in particular areas.[64] Obviously one could think of many other analyses that might be required: analyses of "urban areas," rural areas," farmers, national security, just to name a few. Each one is defensible and each one might have its own constituency, but at some point

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[60] On October 22, 2007, the House of Representatives passed H.R. 3564, the Regulatory Improvement Act of 2007 which would reauthorize the Administrative Conference of the United States. On October 25, it was placed on the Senate Calendar.

[61] Exec. Order 12,866 § 3(f). For a critical review of agency performance in this area covering all economically significant rules issued from July 1996-March 1997, see U.S GEN. ACCOUNTING OFFICE, REGULATORY REFORM: AGENCIES COULD IMPROVE DEVELOPMENT, DOCUMENTATION, AND CLARITY OF REGULATORY ECONOMIC IMPACT ANALYSES (GAO-GGD-99-59) (May 1998).

[62] 44 U.S.C. §§ 3501-3520.

[63] Pub L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. chs. 17A, 25).

[64] *See* Lubbers, *supra* note 1, at 241-74.

the agency's task in issuing rules will be hampered if the task of performing analyses is not made more straightforward and coordinated.

The Administrative Conference observed that the profusion of these analytical requirements has become a problem: "While these analytical emphases can be rationalized individually, in the aggregate, they can result in redundant requirements, boilerplate-laden documents, circumvention, delays, and clutter in the Federal Register."[65] The ABA has also urged that Congress and the President show restraint in establishing analytical requirements.[66]

This is not to minimize the importance of doing regulatory flexibility analysis at all. But as a matter of good government, we should be wary of making it too difficult for the government to issue needed health, safety, and environmental rules.

Despite the many examples of problematic rules that have been documented, we must keep in mind that rules can have great benefits too. As the GAO pointed out in its 2006 report: "The Office of Management and Budget reported that the estimated quantified and monetized annual benefits of the major federal regulations it reviewed from October 1995 through September 2005 range from $94 billion to $449 billion, while estimated annual costs range from $37 billion to $44 billion."[67]

It may be surprising to this Committee to learn that the amount of rulemaking by federal agencies has dropped significantly. The high water mark in both proposed and final rules was in 1979, in the Carter Administration—7611 final rules and 5824 proposed rules. Even in 1983 in the middle of the Reagan Administration, 6049 final rules and 3907 proposed rules were issued. The latest published figures are for 2005, in which the lowest point was reached: 2,257 proposed rules and 3980 final rules This means that the government is now publishing 48% fewer final rules and 61% fewer proposed rules as compared to 1979. And even 34% fewer final rules and 42% fewer proposed rules than the Reagan Administration did in 1983.[68]

Of course I would not ascribe this fall-off entirely to the need for agencies to produce so many special analyses, but there is a lot of needless redundancy. Both the RFA and the Unfunded Mandates Reform Act specifically provide that agencies may perform

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[65] ACUS Recommendation 93-4, "Improving the Environment for Agency Rulemaking," 59 Fed. Reg. 4670 (Feb. 1, 1994) (part I of preamble), *available at* http://www.law.fsu.edu/library/admin/acus/305934.html.

[66] ABA House of Delegates, Recommendation on Rulemaking Impact Analyses (Feb. 1992); *see also* U.S. GEN. ACCOUNTING OFFICE, FEDERAL RULEMAKING: PROCEDURAL AND ANALYTICAL REQUIREMENTS AT OSHA AND OTHER AGENCIES (GAO-01-852T) (June 14, 2001) (testimony of Victor Rezendes, Managing Director, Strategic Issues Team, before the House Comm. on Education and the Workforce) (describing the many requirements and their impact on OSHA rulemaking).

[67] GAO Report, *supra* note 32, at 2, n.2, citing Office of Management and Budget, *Draft 2006 Report to Congress on the Costs and Benefits of Federal Regulations* (Washington, D.C.: April 2006).

[68] *See* COMPETITIVE ENTERPRISE INSTITUTE, "TEN THOUSAND COMMANDMENTS" 28 (2006), *available at* http://www.cei.org/pdf/5407.pdf.

regulatory analyses in conjunction with or as a part of any other analysis required by law, so long as the analysis satisfies each Act's requirements.[69] I would like to see Congress work on a way to consolidate all of these analyses into one comprehensive "regulatory analysis."

7. Overarching budget constraints.

In closing, I would also like to mention that agencies are a bit beleaguered at this point. Budgets and staffing have been flatlined or reduced for many regulatory agencies while their substantive and procedural responsibilities have continued to increase. Just to provide two published examples, (1) in 2000, OSHA had fewer employees than it did in 1971, and nearly eight hundred fewer employees than it had in 1980;[70] and (2) the Commodity Futures Trading Commission's staffing this year has dropped to its lowest level in the agency's 33-year history, and CFTC's Acting Chairman Walter Lukken was quoted as saying: "We are facing flat budgets and exponential growth in the industry. . . . Over the long term this type of budgetary situation is not sustainable."[71]

I have already mentioned some of the incentives that have led agencies to avoid doing reg-flex analyses, convening advocacy review panels, and conducting ten-year reviews. Instead of adding a lot more requirements in the RFA, perhaps this Committee could pursue ways to provide additional funding for agencies based on the number of analyses, panels, and lookback reviews that they do.

I'd be happy to try to answer any questions you may have.

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[69] *See* 2 U.S.C. § 1532(c) (UMRA); 5 U.S.C § 605 (RFA).

[70] *See e.g.*, Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 98 (2000).

[71] David Cho, Energy Traders Avoid Scrutiny As Commodities Market Grows, Oversight Is Slight, WASH. POST, October 21, 2007 at A1.